No. 14787

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

RICHARD WAYNE FRANK,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLEE.

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BRIEF OF APPELLEE.

I.
STATEMENT OF JURISDICTION.

Appellant was indicted by the Federal Grand Jury in and for the Southern District of California, on January 12, 1955 [Tr. pp. 3-6]. The indictment charges appellant in two counts with a violation of Section 462, Title 50, App., United States Code.

On February 7, 1955, appellant was arraigned before the Honorable Ernest A. Tolin, United States District Judge, and entered a plea of not guilty to both counts of the indictment. Trial was had on March 2, 1955, before Judge Tolin, and at the conclusion of the trial, the Court found appellant guilty as charged [Supp. Tr. p. 3].*

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*"Supp. Tr." refers to the Supplemental Transcript filed in typewritten form.

The judgment and commitment following the finding of guilty was filed on March 3, 1955 [Tr. pp. 10-12]. Notice of appeal was filed on March 3, 1955 [Tr. p. 13].

The District Court had jurisdiction of the cause of action under Section 462 of Title 50, App., United States Code, and Section 3231, Title 18, United States Code. This Court has jurisdiction under Section 1291 of Title 28, United States Code.

II.
STATUTE INVOLVED.

The indictment in this case was brought under Section 462 of Title 50, App., United States Code.

It provides in pertinent part:

> "(a) Any . . . person charged as herein provided with the duty of carrying out any of the provisions of this title [Secs. 451-470 of this App.], or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty . . . or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under oath in the execution of this title [said Secs.], or rules, regulations or directions, made pursuant to this title [said Sec.] . . . shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment. . . ."

III.
STATEMENT OF THE CASE.

The indictment returned on January 12, 1955, charges that appellant was duly registered with Local Board No. 31, and was thereafter classified I-O. Count One of the indictment alleges that appellant was ordered to report for civilian work contributing to the maintenance of the National Health, Saftey, and Interest on February 23, 1954, and that appellant did knowingly and willfully refuse to accept said employment. Count Two charges that appellant was ordered to report for civilian work contributing to the maintenance of the National Health, Safety, and Interest on June 18, 1954, and that appellant knowingly and willfully refused to accept such employment [Tr. pp. 3-5].

On February 7, 1955, appellant appeared for arraignment and plea before the Honorable Ernest A. Tolin, United States District Judge. Appellant was represented by his attorney, J. B. Tietz, Esq., and entered a plea of not guilty.

Trial was held before the Honorable Ernest A. Tolin on March 2, 1955, and at the conclusion of all the evidence appellant was found guilty as charged in the indictment [Tr. pp. 10-12].

On March 3, 1955, appellant was sentenced by Judge Tolin, as follows: Count One: Appellant was committed to the custody of the Attorney General for a period of four years, but execution of the sentence was suspended and appellant placed on probation for a period of three years on condition that he enter civilian employment contributing to the National Health, Safety, and Interest and remain so employed for three years. Count

Two: Imposition of the sentence was suspended and appellant placed on probation for a period of two years, to commence and run upon the expiration of probation on Count One [Tr. pp. 11-12].

Appellant assigns as error the judgment of conviction on the following grounds: (1) The District Court erred in failing to grant the motion for judgment of acquittal; (2) the District Court erred in convicting the appellant and entering a judgment of guilty against him (Appellant's Br. p. 10).

IV.
STATEMENT OF THE FACTS.

On September 16, 1948, Richard Wayne Frank registered under the Selective Service System with Local Board No. 31, Martinez, California. He gave his date of birth, October 13, 1929, and was at that time eighteen years old [Ex. p. 1].*

On November 1, 1948, appellant filed his classification questionnaire [Ex. pp. 5-12]. In it, he claimed to be a minister [p. 7], and also a Conscientious Objector [p. 12]. At or about the same time, appellant filed a number of documents in support of his claim that he was a minister [Ex. pp. 16-26].

On November 30, 1948, appellant filed a Special Form for Conscientious Objectors [Ex. pp. 29-35]. On September 20, 1949, appellant was classified IV-E as a Conscientious Objector, by a vote of two to nothing, and on September 21, 1949, a Notice of Classification was mailed

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*"Ex." refers to the exhibit which is appellant's Selective Service file.

him [Ex. p. 13]. Appellant did not appeal this classification or in any way communicate with the Local Board until December, 1951. In fact, appellant began "full time" secular employment as a milkman in December, 1949 [Tr. p. 31; Ex. p. 39].

On November 19, 1951, appellant was classified I-O by the Local Board, by a vote of three to nothing [Ex. p. 13]. On November 20, 1951, Notice of Classification was mailed appellant [Ex. p. 13]. On December 7, 1951, appellant personally went to the Local Board and presented a letter requesting a personal appearance before them [Ex. p. 36]. Appellant testified [Tr. pp. 19-20] that he advised the Clerk at the Local Board that he had received the notice late because it had gone to the wrong address. Appellant did not include this in any of the written material he submitted to the Local Board, nor did he assert to the Local Board that he was requesting a personal appearance within ten days of the receipt of the notice.

On December 17, 1951, appellant advised the Local Board that he was married, and that since December 1, 1949, he had been employed by Golden State Dairy as a milkman [Ex. p. 39].

On July 18, 1952, appellant was ordered to report for an Armed Forces physical examination [Ex. p. 42], and on August 1, 1952, he was advised that he was fully acceptable for induction [Ex. p. 43].

On October 23, 1952, appellant was mailed an Application of Volunteer for Civilian Work [Ex. p. 63], which form was not returned by appellant [Ex. p. 64].

On March 23, 1953, appellant was mailed a Special Report for Class I-O registrants [Ex. pp. 65-68]. In

that report, appellant offered to perform civilian work at Goodwill Industries in Stockton [Ex. p. 66], and revealed that since September, 1952 he had been employed as a roofer at $112.00 a week [p. 67].

Following some further correspondence with regard to civilian work, appellant appeared before the Local Board at their request on April 6, 1953, to discuss civilian employment. While there, appellant advised the Local Board that he would accept employment with Goodwill Industries at Stockton, California [Ex. p. 82], and signed a statement to that effect [Ex. p. 80]. On May 15, 1953, the Local Board was advised that appellant had been to Goodwill Industries at Stockton, California, but rejected employment there because the wages were too low [Ex. p. 93].

On June 22, 1953, the Local Board was advised by Goodwill Industries at Oakland, California, that appellant had visited there with respect to employment [Ex. p. 100], and on July 6, 1953, appellant appeared at the Local Board to state that he would not work for Oakland Goodwill because it did not pay enough to suit him. He also advised that he would not consider employment at Mendocino State Hospital [Ex. p. 104]. Meanwhile, appellant took a five-week vacation to New York [Ex. pp. 104-105].

On July 25, 1952, appellant advised the Local Board, from New York, that he would not accept employment with Goodwill Industries at San Diego because the job did not pay enough [Ex. p. 109].

On February 10, 1954, appellant was mailed an order to report for civilian work, ordering him to report to the Los Angeles County Department of Charities on Feb-

ruary 23, 1954 [Ex. p. 128]. Appellant reported but refused to accept the employment [Ex. p. 132].

On June 1, 1954, appellant was mailed another order to report for civilian work, ordering him to report to the Local Board on June 11, 1954, to receive instructions to proceed to the place of employment [Ex. p. 148]. Appellant reported to the Local Board and was ordered to report to the Los Angeles County Department of Charities on June 14, 1954 [Ex. p. 158]. Appellant reported but refused to accept the employment [Ex. p. 152; Tr. p. 38].

V.
ARGUMENT.

POINT I.

Appellant Was Given Due Process by the Local Board.

Appellant's argument in Point I of his brief is really two-fold: (1) That appellant did not receive a personal appearance before the Local Board; and (2) that appellant did not receive an appeal.

Appellant's Selective Service file [Ex. p. 13] reveals that he filed his Classification Questionnaire in October, 1948 [Ex. p. 5], and at approximately the same time submitted a number of other documents in support of his claim that he was a minister. In September, 1949, appellant was classified IV-E as a Conscientious Objector [Ex. p. 13]. Over two years later—and over three years from the time appellant submitted the information concerning his ministry—appellant was reclassified I-O, also a Conscientious Objector classification [Ex. p. 13]. A notice of classification was mailed appellant on November 20, 1951. Ordinarily, a registrant has ten

days from the *mailing* of that notice, to request *in writing* a personal appearance before the Local Board, or an appeal, or both. See Selective Service Regulations 1624.1(a) and 1626.2(c)(1), (32 C. F. R. 1624.1(a) and 1626.2(c)(1)).

The section relating to an appearance before the Local Board, Section 1624.1(a), grants to every registrant the right of a personal appearance provided "he files a written request therefor within 10 days after the Local Board has mailed a notice of classification (SSS Form No. 110) to him." The regulation then provides: "Such 10-day period may not be extended." The facts here reveal that the registrant made a written request for a personal appearance on December 7, 1951 [Ex. p. 13], seventeen days after the Notice of Classification was mailed him.

Appellee assumes that this 10-day period may not be extended if the notice of classification was properly sent. In this case, appellant testified [Tr. p. 20] that the notice of classification was not sent to his correct address and that he received it late. However, the 10-day period would surely begin to run *no later* than the date of the actual delivery of the notice, and ten days from that date the Local Board would lose *jurisdiction* to grant him a personal appearance. Thus, before a registrant can be given an appearance requested after the 10-day period, it is necessary for him to explain to the Local Board (a) that he did not receive the notice of classification in the ordinary course of the mails; (b) that the delay was not his fault; and (c) that his request for an appearance before the Local Board is made within ten days from the date the notice was received.

Assuming, then, that appellant had a right to a personal appearance if he met the requirements just outlined, appellant in this case failed to carry this burden of proof. Appellant *did not testify* that he made the request within ten days of the receipt of the notice of classification. He did not testify that he *told the Local Board* that he was making the request within the ten-day period [Tr. p. 20].

The question of whether appellant was entitled to a hearing when requested late, is a question of law. But the question of the weight and persuasiveness of the evidence offered by appellant to show that he met the requirements for a late appearance is a question of fact for the trier of fact to determine. In this instance, the trial judge must have determined that appellant did not carry his burden of proof. And, as just noted, there is good reason for this conclusion by the trial judge. Appellant did not testify that he made his request for a personal appearance within ten days after the receipt of the notice. In appellant's letter to the Local Board requesting the personal appearance [Ex. p. 36], he makes no mention of receiving the notice late or of making the request within ten days from the date of receiving the notice. This was appellant's last classification [Ex. 13], and he is required to carry the notice of classification with him at all times (SSS Reg. 1723.5). He did not produce this card at the trial to prove that it was sent to the wrong address.

It follows, therefore, that even if appellant would be entitled to a personal appearance when requested after the ten-day period, such a right would only arise upon a proper showing by the registrant. In this case there

is no evidence that appellant made such a showing to the Local Board, and that showing is *jurisdictional* to the Board's power to permit the appearance.

The Universal Military Training and Service Acts does not give a registrant a "personal appearance." This privilege arises solely from the Regulations. It could be abolished tomorrow. Thus, the 10-day limitation on requesting the appearance and the prohibition against extending that period does not involve due process of law. *George v. United States,* 196 F. 2d 445 (9th Cir., 1952).

Appellant also asserts that he was unlawfully deprived of an appeal. Appellant presupposes in his argument that he asked for an appeal and was denied one because he made the request too late. If such were the case, then Section 1626.2(d) of the Regulations, cited by appellant on page 17 of his brief, might be applicable and the issue then would be whether the Local Board was arbitrary in not granting appellant an appeal. But appellant did not ask for an appeal and, therefore, the section just named does not apply at all. Appellant's only communication with the Local Board relative to his classification, after he was classified I-O, is his letter dated December 6, 1951 [Ex. p. 36], in which he requests a personal appearance before the Board. No mention is made of an appeal, nor could the letter be construed as a request for an appeal because he specifically asked only for a personal appearance. As just noted, the personal appearance was properly denied by the Local Board because he failed to show them that the request was made within ten days of receiving the notice of classification, and the Local Board, therefore, had no jurisdiction to entertain a personal appearance.

POINT II.

Appellant Was Not Denied Due Process of Law Because the Local Board Did Not Have Someone With the Title of Advisor.

This issue has been many times argued before this Court in recent months, and it may be that by the time this appeal is ultimately determined, the question of advisors will be settled. Appellee submits that this issue does not involve due process of law. The duties of advisors are described in Section 1604.41 of the Selective Service Regulations (32 C. F. R. 1604.41) as "to advise and assist registrants in the preparation of questionnaires and other Selective Service forms, and to advise registrants on other matters relating to their liabilities under the Selective Service law." There is no one in California with the title of "Advisor." However, the Selective Service Regulations provide several other persons who perform those services. There are registrars (Sec. 1604.71), Government Appeal Agents (Sec. 1604.71), plus Local Board members, clerks, and employees available to assist registrants. Surely, then, the absence of someone with the title "Advisor" does not involve "a fundamental safeguard," or offend our "concepts of basic fairness." *Simmons v. United States,* 348 U. S. 397, 405-406.

The provision relating to advisors was amended in January 1955, and the words "shall be appointed" were changed to "may be appointed." Thus, in January, the appointment of advisors became optional. Can it now be said that, without advisors, all registrants processed since January 1955 are being denied due process of law? What is due process of law in 1955 was due process of law in 1954. The statutory scheme announced by Congress

is the same. The regulations promulgated under the Act of Congress is the same except for one word.

The District Court considered this point and rejected it [Supp. Tr. p. 2], *after* the decision in *Chernekoff v. United States,* 219 F. 2d 721 (9th Cir., 1955).

POINT III.

Appellant Was Not Denied Due Process of Law in Connection With a Reopening of His Classification, Because the Local Board Was Never Asked to Reopen Appellant's Classification.

Selective Service Regulation No. 1625.2 (32 C. F. R. 1625.2) covers the reopening of classifications by the Local Board. It provides:

> "The Local Board *may* reopen and consider anew the classification of a registrant (a) upon the *written* request of the registrant * * * if such request is accompanied by written information presenting *facts not considered when the registrant was classified which, if true, would justify a change in the registrant's* classification * * *." (Emphasis added.)

Appellant was classified I-O on November 19, 1951 [Ex. p. 13]. Thereafter, on December 7, 1951, he presented a letter requesting a personal appearance before the Board, which the Board, as previously noted, could not grant him under the law [Ex. p. 36]. At or about the same time, appellant submitted a pamphlet to the Local Board [Ex. pp. 37, 38], and on April 7, 1952, submitted another pamphlet [Ex. pp. 40-41]. Appellant did not ask for a reopening of his classification and, above all, he made no such request in *writing* as required by the regulations. Therefore, it can hardly be urged that the Local Board denied him due process in that regard.

But appellant urges in his brief (p. 33) that the new evidence consisting of the two pamphlets indisputably show that he was a minister. The new evidence certainly does not compel that conclusion, and in fact he was not a minister. His letter [Ex. p. 36], merely states that he believes he is entitled to another classification—probably the complaint of most registrants in Class I-A, I-A-O, or I-O. The first pamphlet announces that the registrant is giving a speech and describes him as "representative" of the Watch Tower Society [Ex. p. 37]. The second pamphlet describes the activities of the Theocratic Circuit Assembly of Jehovah's Witnesses on the week-end of February 15 through 17, 1952. This pamphlet reveals that appellant is giving a speech on that week-end along with fourteen other people [Ex. pp. 40, 41]. This "new evidence" hardly characterizes appellant as a minister. Many citizens participate in church activities, including giving speeches and bible study, but that in no respect qualifies that ordinary citizen as a minister.

The reason appellant's showing is so meager is obvious, for *in fact* during this very period of time the registrant was working "full time" for a dairy [Tr. pp. 30, 31; Ex. p. 39], and he was not a minister at all. It should be remembered at this point that all other evidence submitted by appellant relating to church activities was at this period three years old. Thus the Local Board could hardly resist the conclusion—if called upon to reach a conclusion at all—that appellant was not at this time acting as a minister. He had, for over two years, accepted the classification of a Conscientious Objector without complaint [Ex. p. 13], and during this entire period of time appellant had submitted no other evidence of ministerial activities. Further, appellant had failed to advise the Local Board, and

concealed from them for over two years, the fact of his full time employment—this, in spite of the express command of the Selective Service Regulations.

> "Each classified registrant * * * shall, within ten days after it occurs, report to the Local Board in writing any fact that might result in the registrant being placed in a different classification, such as, but not limited to, any change in his *occupational* * * * status * * *." (Sec. 1625.1(b); emphasis added.)

The appellant was, therefore, required under the law to furnish the information concerning his employment. Selective Service Regulation 1623.1(b) (32 C. F. R. 1623.1 (b)), provides:

> "The registrant's classification shall be determined solely on the basis of the official forms of the Selective Service System, and such other written information as may be contained in his file; provided, that the Local Board shall proceed with the registrant's classification whenever * * * (3) *he fails to provide the Local Board with any other information concerning his status which he is requested or required to furnish.*"

Appellant's theory here must be that the new evidence he submitted following his classification on November 19, 1951, commanded a reopening or reconsideration by the Local Board. The inadequacy of that evidence has already been discussed, and in addition, the regulations provide that a request for a reopening by a registrant must be in *writing*.

Appellant also complaints that the Local Board, upon receiving the new evidence, was required to advise the registrant that they refused to reopen—apparently on the theory that appellant could appeal from this decision by

the Local Board. The Local Board was not required to so advise the registrant because they had received no request for a reopening of his classification.

In any event, it would not affect appellant's substantial rights since such a decision by the Local Board would give appellant no right of appeal.

> *Skinner v. United States,* 215 F. 2d 767 (9th Cir., 1954);
>
> *United States ex rel. LaCharity v. Commanding Officer, etc.,* 142 F. 2d 381 (2nd Cir., 1944).

Appellant's argument here is really the same as under Point I of his brief: The Local Board reached the right result but did so in the wrong manner. If appellant ever was a minister he ceased to be one in 1949, when he accepted what he, himself, termed "full time" employment [Tr. p. 31]. His principal objection at each of the several places where he was offered civilian work in lieu of induction was that the wages paid were not enough [see Ex. pp. 93, 104, 109]. (During the period of his interviews appellant was employed as a roofer at $112.00 per week [Ex. p. 67].)

It should also be noted at this point that the court below specifically found that appellant waived his claim to be a minister and elected to proceed as a Conscientious Objector. "I find there was an election to proceed as a conscientious objector. I find that there was a waiver of the right to be classified as a minister" [Supp. Tr. p. 3], and "The whole file shows that the defendant waived." He accepted a Conscientious Objector's classification for over two years—from 1949 to 1951—without complaint [Ex. p. 13]. On April 6, 1953, he advised the Local Board that he accepted employment with Goodwill Indus-

tries in Stockton, California, and signed a statement to that effect [Ex. pp. 80, 82]; and, as just noted, appellant's objection to the civilian employment time and again, was based upon his objection to the low salary scale. Appellee is not asserting here that a registrant, by filing a Conscientious Objector's form and claiming a Conscientious Objector's classification, waives his claim to any other classification. Rather, appellee asserts—as found by the District Court—that there is a *factual* waiver of any claim for a ministerial classification.

POINT IV.

Appellant Was Properly Convicted on Both Counts of the Indictment.

Appellant was first ordered to civilian work in lieu of induction at the Los Angeles County Department of Charities on February 23, 1954 [Ex. p. 128]. He reported, but refused to work [Ex. p. 132]. Thereafter, he was again ordered to civilian work in lieu of induction at the Los Angeles County Department of Charities, and was ordered to report to the Local Board on June 11, 1954, to receive instructions to proceed to the place of employment [Ex. p. 148]. Appellant reported to the Local Board and was instructed to report to the Department of Charities on June 14, 1954 [Ex. p. 158]. Appellant reported on June 18, 1954, but refused employment [Ex. p. 148].

The question here does not involve the view of the Selective Service System of the procedure used in ordering appellant to civilian work. That view is immaterial. The issue with relation to each count is simply whether appellant did the proscribed act or failed to do the required duty. The facts show, and the District Court found, that he did.

A helpful case in this connection is *United States v. Bendik*, 220 F. 2d 249 (2nd Cir., 1955). There the registrant was charged with failing to report for induction. An indictment was returned, charging him with refusing to be inducted on February 13, 1951. At the trial, the proof showed that the registrant failed to report for induction on February 13, 1952. He was acquitted, and another indictment returned charging him with failing to report for induction on February 13, 1952. The registrant claimed prior jeopardy, but the Circuit Court observed, at page 251:

> "A charge of refusal to report on order in February 1951, would support a conviction if proved. A charge of refusal to report in February 1952, on order subsequent to February 1951 would, if proved, support also a conviction of that separate crime."

Conclusion.

Appellant was not denied due process of law by the Local Board. He waived any claim to a classification as a minister and elected to be a Conscientious Objector.

Appellant was properly convicted on both counts in the indictment.

Respectfully submitted,

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